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INFO OCT-01 ISO-00 EB-07 L-02 H-01 SS-15 INR-05 SP-02

RSC-01 /044 R

DRAFTED BY NEA/INS:OKUX:JES

APPROVED BY NEA:LBLAINGEN

EB/IFD/OIA:RJSMITH

EB/OT/GCP:DDUNFORD

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R 242153Z DEC 74

FM SECSTATE WASHDC

TO AMEMBASSY NEW DELHI

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E.O. 11652: N/A

TAGS: BPRO, IN

SUBJECT: TRADE LEGISLATION AMENDMENT ON ARBITRATION AWARDS

REF: A) NEW DELHI 16884; B) NEW DELHI 16754

1. AMENDMENT SUBMITTED BY SENATOR TAFT DECEMBER 13 AND ADOPTED BY SENATE WITHOUT DEBATE WAS ONE OF A NUMBER OF LAST-MINUTE AMENDMENTS TACKED ONTO TRADE BILL. ADMINISTRATION HAD NO ADVANCE WORD OF TAFT AMENDMENT. LANGUAGE TAFT PROPOSED (SEPTTEL FOR FULL TEXT) WOULD BAR RECEIPT OF GSP BY ANY COUNTRY THAT SHOWED BAD FAITH IN PREVENTING PAYMENT OF INTERNATIONAL ARBITRAL AWARDS TO AMERICAN CITIZENS AND COMPANIES. TAFT'S STATEMENT (POUCHED TO NEW DELHI) STRESSED THAT HE HAD INDIA IN MIND, AND HE CLAIMED THAT GOI AS MATTER OF POLICY REFUSED TO PAY SUCH AWARDS TO AMERICAN CONCERNS. TAFT CITED TWO CASES INVOLVING U.S. FIRMS AND THE FERTILIZER CORPORATION OF INDIA (FCI) AS MAIN SUPPORT FOR HIS CONTENTION.

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2. ON DECEMBER 16, TAFT ASKED FOR BRIEFING ON SUBJECT BY

DEPARTMENT OFFICERS AS WELL AS ADMINISTRATION POSITION ON HIS AMENDMENT. WHILE FULL INFORMATION ON SPECIFIC CASES LACKING, DEPARTMENT OFFICERS SAID IT WAS NOT RPT NOT GOI POLICY TO BLOCK ARBITRAL AWARDS AND INDIANS GENERALLY HAD GOOD RECORD IN STICKING TO CONTRACTUAL ARRANGEMENTS WITH FOREIGN COMPANIES. WE PROMISED TO PROVIDE FULLER INFORMATION ON SPECIFIC CASES (AND DID SO AFTER RECEIVING

NEW DELHI'S 16754).

3. MORE GENERALLY, DEPARTMENT OFFICERS TOLD TAFT THAT ADMINISTRATION OPPOSED HIS AMENDMENT SINCE IT WOULD UNDERCUT OUR EFFORTS TO PROMOTE ARBITRATION AS A MEANS OF SOLVING COMMERCIAL DISPUTES. WE INDICATED WILLINGNESS TO HAVE ACCEPTANCE OF ARBITRATION AWARDS INCLUDED IN DISCRETIONARY PROVISIONS AS ONE OF FACTORS EXECUTIVE WOULD TAKE INTO ACCOUNT IN GRANTING GSP, OR, AS FALLBACK, TO HAVE PRESIDENTIAL WAIVER TO TAFT AMENDMENT IF CONFERENCE REFUSED TO DELETE IT ENTIRELY OR ENCOMPASS IT IN DISCRETIONARY PROVISIONS OF TRADE BILL. WE POINTED OUT TO TAFT THAT OUR PRELIMINARY VIEW WAS THAT AMENDMENT WOULD NOT BE APPLICABLE TO INDIA SINCE WE WERE UNAWARE OF BAD FAITH ON PART OF GOI. WE NOTED THAT CHALLENGING ARBITRAL AWARDS ON POINTS OF LAW (AS IN FCI CASE) WAS ACCEPTED LEGAL PRACTICE. TAFT STRESSED HIS ANNOYANCE WITH INDIANS. ACCORDING TO THE SENATOR, THEY WERE AS A MATTER OF POLICY DRAGGING THEIR FEET IN THIS CASE AND, ACCORDING TO HIS INFORMATION, IN OTHER SIMILAR INSTANCES.

4. AFTER DEPARTMENT DISCUSSED MATTER WITH INDIAN EMBASSY, ECONOMIC MINISTER RAMAKRISHNA MET WITH TAFT DECEMBER 17 AND REVIEWED CASE. ACCORDING TO INDIANS AND A TAFT STAFFER, THERE WAS A DIFFERENCE OF OPINION ON TWO SALIENT POINTS IN THE FCI CASE: (1) TAFT CLAIMS FCI ACTED AS MATTER OF GOI POLICY TO BLOCK PAYMENT. RAMAKRISHNA CLAIMS FCI WENT TO COURT IN KEEPING WITH TERMS OF CONTRACT ON ADVICE OF PRIVATE COUNSEL THAT THERE WAS CHANCE TO WIN CASE BECAUSE OF POINT OF LAW AND ALSO BECAUSE FCI WAS ACTING AS ANY CORPORATE ENTITY WOULD UNDER SIMILAR CIRCUMSTANCES (I.E. TO TRY TO AVOID PAYING AWARD IF LEGAL LIMITED OFFICIAL USE

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WAY COULD BE FOUND) AND NOT AS AN EXPRESSION OF A GOI POLICY REFUSAL TO PAY AWARDS TO AMERICANS. (2) TAFT CLAIMS THAT COURTS HAVE DRAGGED OUT PROCESS FOR AN UNDULY LONG PERIOD, THUS WORKING SPECIAL HARDSHIP ON THE US ATTORNEYS INVOLVED. INDIANS HERE UNINFORMED ON THIS POINT BUT NOTED THAT COURTS DO MOVE SLOWLY.

5. IN CONFERENCE ACTION ON TRADE BILL DECEMBER 19, TAFT

AMENDMENT WAS RETAINED BUT LANGUAGE PERMITTING PRESIDENT TO WAIVE THIS PROVISION IN THE NATIONAL ECONOMIC INTEREST WAS INSERTED. THIS IS ONE OF THE FEW INSTANCES WHERE CONFEREES AGREED TO WATER DOWN LAST-MINUTE AMENDMENTS IN RESPONSE TO ADMINISTRATION EFFORTS.

6. OUR PRELIMINARY VIEW, WHICH WE HAVE PASSED TO INDIAN EMBASSY AS WELL AS TO TAFT'S OFFICE, IS THAT FCI PROBLEM IS A STRAIGHT COMMERCIAL DISPUTE WHICH ON INFORMATION SO FAR AVAILABLE TO US DOES NOT INDICATE ANY GOI BAD FAITH POLICY IN DEALING WITH ARBITRAL AWARDS TO AMERICAN CONCERNS. THEREFORE, OUR INITIAL JUDGEMENT IS THAT LANGUAGE OF TAFT AMENDMENT DOES NOT AFFECT INDIA'S ELIGIBILITY. WAIVER REQUIREMENT, IN THESE CIRCUMSTANCES, DOES NOT ARISE.

7. TO CLARIFY DISPUTED POINTS NOTED IN PARA 4 ABOVE, WOULD APPRECIATE EMBASSY VIEWS BASED ON REVIEW OF FACTS OF CASE WHETHER (A) FCI COURT ACTION WAS, AS INDIANS ALLEGE, LEGAL MANEUVERING RATHER THAN GOI POLICY EFFORT , AND (B) WHETHER THERE HAS BEEN IMPROPER DELAY IN COURT'S HANDLING OF CASE. WE WOULD ALSO LIKE EMBASSY'S COMMENT ON OUR PRELIMINARY VIEW REGARDING INDIAN POLICY TOWARD ARBITRAL AWARDS.

8. IT WOULD ALSO BE HELPFUL FOR EMBASSY TO GIVE US FULLER RUNDOWN ON THE TWO FCI CASES THAN THAT PROVIDED IN REFTELS MENTIONED IN NEW DELHI 16754. WE ARE STILL NOT ENTIRELY CLEAR ABOUT DETAILS; FOR EXAMPLE, WE ARE NOT CERTAIN WHAT THE SECOND ARBITRATION MENTIONED IN PARA 3 OF NEW DELHI 16884 REFERS TO. KISSINGER

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Message Attributes

Automatic Decaptioning: Z
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: n/a
Control Number: n/a
Copy: SINGLE
Draft Date: 24 DEC 1974
Decaption Date: 28 MAY 2004
Decaption Note: 25 YEAR REVIEW
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: shawdg
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974STATE281361
Document Source: CORE
Document Unique ID: 00
Drafter: OKUX:JES
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D740374-0285
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19741211/aaaaajfb.tel
Line Count: 145
Locator: TEXT ON-LINE, ON MICROFILM
Office: ORIGIN NEA
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: STADIS
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: STADIS
Reference: 74 NEW DELHI 16884, 74 NEW DELHI 16754
Review Action: RELEASED, APPROVED
Review Authority: shawdg
Review Comment: n/a
Review Content Flags:
Review Date: 19 AUG 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <19 AUG 2002 by kellew0>; APPROVED <19 MAR 2003 by shawdg>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: TRADE LEGISLATION AMENDMENT ON ARBITRATION AWARDS
TAGS: BPRO, IN
To: NEW DELHI
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005